

NTSB Order No. EA-4460

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 11th day of June, 1996

Docket SE-14442

6709

sought to revoke any airman certificate held by the respondent, including Airman Pilot Certificate No. 534546638, with airline transport pilot privileges. The law judge determined that while the Administrator had proved violations of sections 61.59(a)(2), 91.13(a), 135.63(d) and 135.65(b)² of the Federal Aviation

²FAR sections 61.59(a)(2), 91.13(a), 135.63(d) and 135.65(b) provide as follows:

§ 61.59 Falsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records.

(a) No person may make or cause to be made--

* * *

(2) Any fraudulent or intentionally false entry in any logbook, record, or report that is required to be kept, made, or used, to show compliance with any requirement for the issuance, or exercise of the privileges, or [sic] any certificate or rating under this part....

§ 91.13 Careless or reckless operation.

(a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

§ 135.63 Recordkeeping requirements.

* * *

(d) The pilot in command of an aircraft for which a load manifest must be prepared shall carry a copy of the completed load manifest in the aircraft to its destination. The certificate holder shall keep copies of completed load manifests for at least 30 days at its principal operations base, or at another location used by it and approved by the Administrator.

§ 135.65 Reporting mechanical irregularities.

* * *

(b) The pilot in command shall enter or have entered in the aircraft maintenance log each mechanical irregularity that comes to the pilot's attention during flight time. Before each flight, the pilot in command shall, if the pilot does not already know, determine the status of each irregularity entered in the maintenance log at the end of

Regulations ("FAR," 14 CFR Parts 61, 91, and 135), the appropriate sanction was a 180-day suspension of respondent's airman certificate, not revocation.

On appeal, the Administrator contends that the law judge erred 1) by concluding that the respondent had not, as alleged, made two overweight landings, in violation of FAR section 91.9(a),³ and 2) by finding that the respondent was qualified to retain his certificate even though he had made intentionally false entries in load manifests relating to the flights during which the allegedly overweight landings were made. For the reasons discussed below, we agree with the Administrator that the law judge should have found that respondent's falsifications demonstrated that he lacks the qualifications required of an

(..continued)
the preceding flight.

³FAR section 91.9(a) provides as follows:

§ 91.9 Civil aircraft flight manual, marking, and placard requirements.

(a) Except as provided in paragraph (d) of this section, no person may operate a civil aircraft without complying with the operating limitations specified in the approved Airplane or Rotorcraft Flight Manual, markings and placards, or as otherwise prescribed by the certificating authority of the country of registry.

In his decision, the law judge cites this section as one the Administrator had established. This was a mistake, however, since the law judge had in fact concluded that the evidence did not adequately support the Administrator's allegations that respondent had made two overweight takeoffs. We agree with the respondent that it is not appropriate for us to attempt to determine at this stage of the proceeding whether respondent's operation of the subject flights may have violated this regulation in ways not specified in the complaint.

airman, a conclusion that dictates the revocation of his certificate without regard to the validity of the law judge's assessment of the evidence concerning the two alleged operational violations he did not sustain.⁴

In his March 25, 1996 Emergency Order of Revocation, the Administrator alleged, among other things, the following facts and circumstances concerning the respondent:

2. On or about December 26, 1995, you served as the pilot in command of civil aircraft N6878L, a Cessna Model CE-402, a multiengine aircraft, on a series of four passenger-carrying flights operated under Part 135 of the Federal Aviation Regulations (FAR) by Baker Aviation, Inc., which began and ended at Kotzebue, Alaska, with intermediate stops at Selawik, Kivalina, and Red Dog Mine.

3. Prior to taking off from Kotzebue on the above series of flights, you made an entry on the load manifest for these flights indicating that you had 550 pounds of fuel on board the aircraft and that the gross take-off weight of the aircraft was 6928 pounds.

4. The entries referenced in paragraph 3 were intentionally false in that you knew, at the time you made the entries, that you actually had approximately 750 pounds of fuel on board the aircraft and that the gross weight of the aircraft was approximately 7128 pounds.

5. At the time you landed at Selawik on the above series of flights, the gross weight of the aircraft was approximately 6956 pounds.

6. At all times mentioned herein, the maximum gross landing weight for civil aircraft N6878L was 6850 pounds.

* * *

9. Prior to departing on the flight from Selawik to Kivalina, you made entries on the load manifest indicating the fuel on board was 450 pounds and that the take-off weight of the aircraft was 6229 pounds.

10. Prior to departing on the flight from Kivalina to Red

⁴The respondent has filed a reply brief opposing the appeal.

Dog Mine, you made entries on the load manifest indicating the fuel on board was 270 pounds and that the take-off weight of the aircraft was 6269 pounds.

11. Each of the entries referenced in paragraphs 9 and 10 was intentionally false in that you knew at the time the correct weight for each entry was approximately 200 pounds higher.

12. Prior to taking off from Red Dog Mine on the above-referenced flight, you made an entry on the load manifest indicating you had 170 pounds of fuel on board the aircraft. You then changed this entry to indicate 370 pounds of fuel.

* * *

24. On or about January 11, 1996, you served as the pilot in command of civil aircraft N6878L on a series of two flights operated in air commerce under Part 135 of the FAR by Baker Aviation, Inc., from Nome to Shishmaref and a return to Nome.

25. Upon landing at Shishmaref on the flight referenced in paragraph 24, you made entries on the load manifest indicating the fuel consumed during the flight from Nome was 320 pounds and that the aircraft had 580 pounds of fuel on board.

26. Both of the entries referenced in paragraph 25 were intentionally false because you knew at the time you made them that the actual fuel consumed on the flight from Nome was 220 pounds.

27. At the time of the landing at Shishmaref on the flight referenced in paragraph 24, the aircraft was approximately 70 pounds over the maximum gross landing weight of 6850 pounds.⁵

The law judge, rejecting as not credible the respondent's exculpatory explanations respecting the manifests, concluded that

⁵Not included in the above listing are those allegations in support of regulatory violations the law judge affirmed which are not involved in this appeal; specifically, the allegations that respondent made several flights in January 1996 on which he carried load manifests that were incomplete because of omissions and inaccuracies (FAR sections 135.63(d) and 91.13(a)), and the allegation that he had not complied with maintenance obligations concerning an undisputed overweight landing on December 31, 1995 (FAR section 135.65(b)).

respondent had knowingly both understated his fuel on board as to the December 26 series of flights and overstated his fuel usage as to the January 11 flights. Notwithstanding that conclusion, and though apparently recognizing that respondent's motive for the falsifications was to avoid creating a record showing that he had made two overweight landings, the law judge determined that the Administrator had not produced enough evidence to establish the charges based on overweight landings on these two dates. We will not disturb that judgment, not because we agree that more evidence was necessarily required, but because we are not persuaded that the law judge's contrary assessment must be deemed erroneous.

In analyzing the evidence on whether the respondent had made the overweight landings, the law judge relied on the testimony of the parties' witnesses concerning the aircraft's ability to have completed the December 26 series of flights with the amount of fuel the manifest indicated was on board (550 pounds) and to have consumed, on the Nome-Shishmaref leg of the January 11 flight, as much fuel as the manifest reflected (320 pounds). As to the first question, even the Administrator's expert witness conceded that it was possible, albeit not likely, to have completed the flight (with required fuel reserve) with only 550 pounds of fuel at the outset. As to the second question, expert testimony for the respondent suggested that it was possible for the aircraft to have consumed a quantity of fuel that would have kept it from being overweight when it landed. Given these possibilities, and

the absence of significant information concerning the flights (such as actual weather conditions along the routes) to refute the respondent's account of the power settings he used in operating them, the law judge determined that the Administrator's evidence was insufficient to prove that the respondent had, as alleged, landed overweight at Selawik and Shishmaref. While that determination does not reflect the Administrator's views as to whose witnesses should have been judged more persuasive based on their fuel calculating expertise or possible bias, it is, we think, sustainable on this record.

The law judge, without discussing what sanction the non-falsification violations in the case, standing alone, might warrant, essentially concluded that a 180-day suspension should be imposed rather than revocation because, among other contextual factors having no bearing on the issue, the respondent's intentional falsifications were "isolated" and "not part of a plan to circumvent" regulatory requirements. See I.D. at 1180. The law judge's decision in this respect cannot be reconciled with relevant Board precedent, such as Administrator v. McCarthney, et al., 7 NTSB 670, 672 (1990) ("Board precedent firmly establishes that even one intentional falsification compels the conclusion that the falsifier lacks the necessary care, judgment and responsibility required to hold any airman certificate."),⁶ and the case that the law judge does rely on,

⁶See also, e.g., Administrator v. Van Eaton, NTSB Order No. EA-4435 (1996), and Administrator v. Mason, NTSB Order No. EA-3483 (1992).

Administrator v. Kingfisher Air Service, et al., 5 NTSB 945 (1986), is inapposite. The revocation in that case, which involved allegations of manifest falsifications but no charge of intentional falsification, was predicated on the perceived contempt for regulations that one of the respondents' repeated violations of the prohibition against overweight flights reflected. There is no language in Kingfisher that could be deemed instructive for purposes of assessing the appropriate sanction for an airman whose truthfulness has been drawn in issue by a proved intentional falsification. While we respect the prerogative of our law judges to disagree with Board precedent and policies, and to depart from them where the facts so justify, we expect our case law in other circumstances to be followed unerringly, especially where it is as clear and unequivocal as it is in this instance, lest the parties be burdened with the need to take otherwise unnecessary appeals to correct rogue decisions that substitute a factfinder's preferences for the agency's, in disregard of the need for uniformity and predictability in a principled, administrative decisionmaking process.

With all due respect to the law judge's view that an airman who only occasionally and randomly falsifies required documents should not be judged lacking in the non-technical qualifications demanded of a certificate holder, we see no middle ground where an airman's trustworthiness is concerned. Although we are not prepared to hold that an airman's reasons for falsifying a required record could never justify a sanction less than

revocation, we are satisfied that falsifying an aircraft's weight and fuel figures on a load manifest to elude discovery by others that the flight could not lawfully be, or have been, conducted is not such a reason.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is granted in part;
2. The initial decision, except with respect to sanction, is affirmed; and
3. The revocation ordered in the Administrator's Emergency Order of Revocation is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT and BLACK, Members of the Board, concurred in the above opinion and order. GOGLIA, Member, did not concur.